(13)

No. 03-1423

SUPREME COURT, U.S.
FILED
NOV 3 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

MARK D. ROSENBAUM
AHILAN T. ARULANANTHAM, *Counsel of Record*
ANIL KALHAN, Cooperating Attorney
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, CA 90026
Tel: (213) 977-9500

STEVEN R. SHAPIRO
LUCAS GUTTENTAG
LEE GELERNT
AMERICAN CIVIL LIBERTIES UNION
125 Broad St.
18th Floor
New York, NY 10004-2400
Tel: (212) 549-2500

Counsel for Amicus Curiae American Civil Liberties Union and ACLU Foundation of Southern California

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. CONGRESS HAS PRE-EMPTED ANY STATE-CREATED AUTHORITY TO ENFORCE THE FEDERAL IMMIGRATION LAWS	5
A. This Court Has Made Clear That the Federal Government Has Pre-Eminent Authority to Establish and Enforce the Immigration Laws	6
B. Congress Has Granted to the Attorney General the Power to Interrogate, Search, Detain, and Arrest Aliens and Carefully Delineated the Scope of That Power	9
C. The Federal Government Has Delegated Immigration Enforcement Authority to State and Local Officers in Certain Narrowly Circumscribed Areas	13
1. Authority to Enforce Provisions Relating to Smuggling, Transporting, and Harboring Aliens	14
2. Authority to Enforce Any Immigration Power During Mass Influx	15
3. Authority to Enforce Provisions Governing Criminal Illegal Reentry	16
4. Authority Conferred Pursuant to Written Agreement	18

TABLE OF CONTENTS – Continued

Page

D. Neither the United States nor Petitioners Have Identified Statutory Authority in Support of Petitioners' Actions in this Case 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Carrasca v. Pomeroy, 313 F.3d 828 (3rd Cir. 2002) 18

Chy Lung v. Freeman, 92 U.S. 275 (1875) 6

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 9

De Canas v. Bica, 424 U.S. 351 (1976) 9

Elkins v. Moreno, 435 U.S. 647 (1978) 10

Gonzales v. Peoria, 722 F.2d 468 (9th Cir. 1983) 23, 27, 28

Graham v. Richardson, 403 U.S. 365 (1971) 7, 23

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 6

Hines v. Davidowitz, 312 U.S. 52 (1941) ..... *passim*

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 28

Martinez-Camargo v. INS, 282 F.3d 487 (7th Cir. 2002) 18

Mountain High Knitting v. Reno, 51 F.3d 216 (9th Cir. 1995) 29

Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) 7

Toll v. Moreno, 458 U.S. 1 (1982) 8, 23

United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999) 18

Wilson v. Layne, 526 U.S. 603 (1999) 26

TABLE OF AUTHORITIES – Continued

Page

STATUTES

8 C.F.R. 287.5(a)(1) 12
8 C.F.R. 287.5(b) 12
8 C.F.R. 287.5(c) 12
8 U.S.C. 1101 10
8 U.S.C. 1103(a)(10) 15, 24, 25
8 U.S.C. 1160(b)(7) (originally enacted in 1986) 27
8 U.S.C. 1252c 16, 17, 18, 26, 29
8 U.S.C. 1252c(a) 16, 24, 25
8 U.S.C. 1253(a)(1) (originally enacted in 1996) 27
8 U.S.C. 1255a(c)(5) (originally enacted in 1996) 27
8 U.S.C. 1304(e) 26, 28, 29
8 U.S.C. 1324(c) (originally enacted as Immigration and Nationality Act of 1952, sec. 274(b), Pub. L. No. 82-414, 66 Stat. 228, 229 (1952)) 14, 24, 25, 26, 27, 29
8 U.S.C. 1324a(f) (originally enacted in 1986) 27
8 U.S.C. 1324c (originally enacted in 1990) 27
8 U.S.C. 1325 27
8 U.S.C. 1325(c) (originally enacted in 1986) 27
8 U.S.C. 1325(d) (originally enacted in 1990) 27
8 U.S.C. 1326 ..... 18, 27
8 U.S.C. 1326(b)(1) (originally enacted in 1988) 27
8 U.S.C. 1326(b)(2) (originally enacted in 1988) 27
8 U.S.C. 1357 25
8 U.S.C. 1357(a) 11, 23, 25

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. 1357(a)(1) 10, 12
8 U.S.C. 1357(a)(2) 10, 12
8 U.S.C. 1357(a)(3) 10, 12
8 U.S.C. 1357(a)(4) 10, 12
8 U.S.C. 1357(a)(5) 11, 12
8 U.S.C. 1357(a)(5)(A) 11
8 U.S.C. 1357(a)(5)(B) 12
8 U.S.C. 1357(c) 10
8 U.S.C. 1357(g) 19, 20, 22, 24
8 U.S.C. 1357(g)(1) 19, 23, 29
8 U.S.C. 1357(g)(2) 19
8 U.S.C. 1357(g)(3) 19
8 U.S.C. 1357(g)(5) 19
8 U.S.C. 1357(g)(10) 21, 23, 24, 25
42 U.S.C. 1983 1
Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) 15
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996) 15
Immigration Act of 1990, Sec. 503(a), 101 Pub. L. No. 649, 104 Stat. 5048 (1990) 11
Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) 10, 14

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

59 Fed. Reg. 42406 (Aug. 17, 1994) 12

142 Cong. Rec. H 2190 (1996) 17, 18

142 Cong. Rec. H 2475 (1996) 20, 21, 22

H. Rep. No. 82-1365 (1952) *reprinted in* 1952 U.S.C.C.A.N. 1653 11

Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws,* 6 U. Pa. J. Const. L. 1084 (2004) 14, 22

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. As part of this work, the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants. The American Civil Liberties Union Foundation of Southern California is a regional affiliate of the national ACLU.

STATEMENT OF THE CASE

Respondent Iris Mena, a lawfully present permanent resident, won a judgment by jury trial against Petitioner police officers under 42 U.S.C. 1983 for violation of her Fourth Amendment rights. The jury found that the officers subjected Respondent to an unreasonably lengthy detention that involved unreasonable force. The Ninth Circuit affirmed this judgment on two grounds. First, the court found that the length and manner of the detention rendered it unreasonable. Second, the court found that Petitioners' decision to interrogate Respondent about her immigration status without particularized suspicion also rendered the detention unreasonable. Petitioners' Appendix to the Petition For A Writ of Certiorari ("Pet. App.") at

[1] This brief was not authored in any part by counsel for either party. No person or entity other than *amici curiae* and its counsel made any monetary contribution to the submission of this brief. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of the Court.

9a-10a. This second ground was neither briefed nor argued by either party at trial or on appeal. The court also noted in passing that it was doubtful whether Petitioners, as local police officers, had statutory authority to question Respondent about her federal immigration status. However, the court ultimately expressed no opinion on this issue. Pet. App. at 13a n.15.

SUMMARY OF ARGUMENT

The judgment below should be affirmed for the reasons set forth in Respondent's brief. *Amici* do not repeat those arguments here. Instead, this brief focuses on Petitioners' claim, defended in part by the United States as *amicus curiae*, that as local law enforcement officers Petitioners had authority to enforce the federal immigration laws. As *amici* explain herein, the arguments advanced by both the United States and Petitioners are incorrect as a matter of law. Analysis of this Court's caselaw and the various federal statutory provisions on this subject makes clear that Petitioners did not have legal authority to question Respondent concerning her immigration status. However, this Court need not and should not resolve this issue, both because it may affirm the jury's verdict without considering it, and because the factual record from the trial court is incomplete on the subject.

Petitioners claim that, as local law enforcement officers, they had statutory authority to interrogate and investigate Respondent, a lawfully present permanent resident, regarding her right to be in the United States under federal immigration law. This assertion is incorrect.

Congress, acting under its well-established power to make laws governing the entry and exit of aliens and to implement those laws through the regulation of aliens present in the United States, has pre-empted any state or local authority to enforce the immigration laws, including any authority to interrogate or investigate aliens such as Ms. Mena concerning their compliance with the federal immigration laws.

For over a century, this Court has made clear that Congress has pre-eminent authority to legislate in the immigration field and regulate aliens present within the United States. During that time, the Court has repeatedly struck down state attempts to regulate in areas where the federal government has established its own rules, particularly where the states' rules impose burdens on lawfully-admitted aliens. *See infra* Part I.A.

The current federal immigration laws and regulations contain a comprehensive scheme regulating the investigation, interrogation, search, detention, and arrest of aliens. This scheme specifies both which officers may engage in these enforcement activities and under what conditions they may do so. These detailed laws and regulations pre-empt any state law purporting to authorize state or local officials to investigate, interrogate, search, or otherwise enforce the federal immigration laws. *See infra* Part I.B.

Congress also has enacted legislation specifically setting forth narrowly circumscribed conditions under which state and local officials may enforce the immigration laws. The text and legislative history of these provisions make clear that they strike a careful balance by providing some authority to state and local officers but limiting that authority in significant ways. Careful analysis

of the statutory text and history resolves any doubts concerning whether or not state authority to enforce the immigration laws has been pre-empted. *See infra* Part I.C.

Petitioners and the United States do not appear to agree on the purported basis for Petitioners' statutory authority to interrogate Respondent, or on the scope of that authority. The United States contends either that Petitioners acted lawfully because they sought only to question Respondent, a doubtful characterization given that they handcuffed her at gunpoint and searched her purse at the time of the questioning, or that they acted pursuant to a federal statute that contemplates, at least in certain circumstances, cooperation between local and federal officials in enforcing the immigration laws. Petitioners, in contrast, claim that state law grants them authority to enforce federal criminal immigration laws, and that the particular criminal immigration law they were enforcing in this case requires aliens to carry their immigration documents at all times. Neither claim is persuasive. The federal statute cited by the United States was never intended to confer on local officials the free-wheeling authority to investigate any and all immigration violations, and the state authority Petitioners rely upon has been pre-empted by a comprehensive scheme of federal regulation. *See infra* Part I.D.

ARGUMENT

Both Petitioners and Respondent agree that the Ninth Circuit should not have commented upon the question whether Petitioners had authority to question Ms. Mena concerning her immigration status. This is not surprising;

Ms. Mena never pled in the complaint, argued at trial, or briefed on appeal the argument that Petitioners lacked statutory authority to question her concerning her immigration status. The opinion below explicitly declined to resolve the issue, *see* Pet. App. at 13a n.15, and neither of the parties' briefs here addresses it in any detail. Nor does it appear to be fairly subsumed within either of the questions presented.

Accordingly, in our view the Court need not and should not resolve the issue concerning Petitioners' statutory authority under the immigration laws, as it is unnecessary in order to affirm the judgment below. However, if the Court does consider that issue on this sparse record, it must conclude that the Petitioners lacked authority to interrogate and investigate Respondent concerning her immigration status.

I. CONGRESS HAS PRE-EMPTED ANY STATE-CREATED AUTHORITY TO ENFORCE THE FEDERAL IMMIGRATION LAWS

A long line of this Court's cases establish that where the federal government has regulated in an area concerning immigration, the Supremacy Clause pre-empts state authority to regulate in that same area. Congress has heavily regulated the power to interrogate, investigate, search, detain, and arrest aliens for violations of the immigration laws. Where such detailed regulation exists, this Court's cases make clear that any state law regulating the same general area is displaced. Any doubt about the pre-emptive force of the federal statutes in this area is resolved by the detailed federal immigration provisions governing the extent to which state and local officials may enforce the federal immigration laws. Where, as here, the

federal government has regulated precisely the same area that a state law also purportedly governs, the state law is pre-empted.

A. This Court Has Made Clear That the Federal Government Has Pre-Eminent Authority to Establish and Enforce the Immigration Laws

For over one hundred years, this Court has recognized the federal government's pre-eminent authority both to make the laws governing the entry and exit of aliens and to implement those laws through the regulation of aliens present in the United States. Consistent with this constitutional principle, the Court has repeatedly struck down state statutes that regulate in this area on Supremacy Clause grounds. "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, *and for the manner of their execution*, belongs solely to the national government." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (emphasis added). Since that time, this Court has repeatedly emphasized Congress' unique power in this sphere. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (noting that the authority to control immigration is "vested solely in the Federal Government, rather than the States"). Moreover, the Court has not limited its understanding of the federal government's power to enforce the laws in this area to monitoring aliens at the point of entry. Rather, the Court has recognized the federal government's power over the regulation of aliens

within the country as well, *see Hines v. Davidowitz*, 312 U.S. 52, 69-70 (1941).[2]

This Court's decision in *Hines* makes clear that the issue presented in this case squarely implicates the federal government's immigration power. *Hines* involved a state statute requiring that aliens lawfully present in Pennsylvania provide certain information to allow the state to monitor them, as part of a registry program. 312 U.S. at 59. Shortly after its passage, the federal government enacted a similar, but less burdensome, registration system. *See id.* at 60. This Court held that the federal scheme pre-empted the state registration system. "When the national government by treaty or statute has established rules . . . touching the rights, privileges, obligations or burdens of aliens as such . . . [n]o state can add to or take from the force and effect of such treaty or statute." *Id.* at 62-63.

Most important for present purposes, the Court found the state law pre-empted because it burdened aliens by subjecting them to questioning at the behest of Pennsylvania state officers in a way not contemplated by the federal scheme:

> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens – *such as subjecting them alone, though perfectly*

---

[2] At times, the Court has also found pre-emption over state laws regulating the economic status of aliens. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 421-22 (1948) (striking down state-imposed commercial fishing restrictions on aliens); *see also Graham v. Richardson*, 403 U.S. 365, 378 (1971) (holding that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies").

> *law-abiding, to indiscriminate and repeated interception and interrogation by public officials* – thus bears an inseparable relationship to the welfare and tranquillity of all the states. . . . Laws imposing such burdens . . . provoke questions in the field of international affairs. . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Id. at 65-67 (emphasis added). Thus, *Hines* made clear that where a state attempts to regulate and monitor the presence of aliens through questioning beyond that authorized by federal law, the state law cannot survive if the federal government has regulated the same area.

More recent cases confirm the continuing vitality of *Hines'* rule. In *Toll v. Moreno*, 458 U.S. 1 (1982), the Court reiterated that "[u]nder the Constitution the states . . . can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States." *Id.* at 11. In doing so, the Court struck down a Maryland statute prohibiting certain temporary residents from receiving in-state tuition under state law primarily because the federal government allowed that same class of residents to establish domicile for purposes of federal law. *Id.* at 14. Again, because the federal government had legislated in the same

general area concerning aliens, the state could not regulate that area.[3]

In contrast, this Court has upheld state regulation of the conduct of non-citizens only where the laws in question involved areas sparsely regulated by Congress, and even then only where the laws did not place burdens on lawfully admitted aliens. *See De Canas v. Bica*, 424 U.S. 351, 358-61 (1976) (finding state law prohibiting employers from knowingly hiring undocumented workers not pre-empted because federal legislation on the subject was extremely sparse and state law did not burden lawfully present aliens).

Under the pre-emption doctrine established by these cases, it is clear that where Congress has legislated in any detail in an area concerning the treatment of aliens under the immigration laws, the states may not establish or exercise their own independent authority over aliens in that same area. Moreover, when the state authority in question burdens lawfully-admitted aliens in an area where Congress has already chosen to impose some burdens on that class of aliens, the pre-emptive force of federal law is greater still.

B. Congress Has Granted to the Attorney General the Power to Interrogate, Search, Detain, and Arrest Aliens and Carefully Delineated the Scope of That Power

Congress has exercised its plenary authority over the admission and exclusion of aliens by conferring broad

---

[3] This Court has also continued to cite *Hines* to explain its pre-emption jurisprudence in other contexts. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing *Hines*, 312 U.S. at 66-67).

authority upon the Attorney General to interrogate, search, detain, and arrest aliens under certain carefully delineated circumstances. Any state authority to enforce in this area is pre-empted by this comprehensive and delicately balanced set of federal laws.

The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), codified as amended at 8 U.S.C. 1101 *et seq.*, which this Court has described as "a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents," *Elkins v. Moreno*, 435 U.S. 647, 664 (1978), specifically grants the Attorney General broad power to designate particular *federal* officers to engage in a broad range of explicitly defined enforcement activities. *See, e.g.*, 8 U.S.C. 1357(a)(1)[4] (granting authority to "interrogate any alien . . . as to his right to be or to remain in the United States"); 8 U.S.C. 1357(a)(2), (4) (conferring authority to "arrest" any alien for civil and criminal violations of the federal immigration laws under certain designated circumstances); 8 U.S.C. 1357(a)(3) (granting, within a "reasonable distance" of the border, authority to "board" any vessel, railway car, aircraft, conveyance, or vehicle in order to "search for aliens," and within twenty-five miles of the border, to "have access to private lands, but not dwellings" in order to patrol the border to prevent illegal entry of aliens); 8 U.S.C. 1357(c) (granting authority to "conduct a search, without warrant," of individuals

[4] Unless otherwise noted, all citations to the U.S. Code are to the current version. Where relevant, the date of original enactment is indicated parenthetically.

seeking admission to the United States upon "reasonable cause" to suspect grounds to deny such admission).

The scope of the INA's grant of enforcement authority is comprehensive yet painstakingly specified. Congress intended, for example, to "make a very carefully considered distinction between powers which may be exercised without warrant and such where a warrant will be required." H. Rep. No. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1710. Moreover, when Congress amended Section 1357(a) in 1990 to "enhanc[e]" and "broaden[]" the federal government's enforcement authority by granting the Attorney General power to authorize immigration officers to make arrests for certain federal criminal offenses unrelated to immigration,[5] it precisely specified the categories of federal crimes for which such arrests would be permitted and explicitly made that authority subject to several conditions, including (1) that the immigration officer be "performing duties relating to the enforcement of the immigration laws at the time of the arrest," and (2) that there be "a likelihood of the person escaping before" an arrest warrant could be obtained.[6] 8 U.S.C. 1357(a)(5). *See also* 8 U.S.C. 1357(a)(5)(A) (conferring authority to "make arrests" for "offense[s] against the

[5] Immigration Act of 1990, Sec. 503(a), 101 Pub. L. No. 649, 104 Stat. 5048 ("Sec. 503. Enhancing Enforcement Authority of INS Officers. (a) Broadening Authority.")

[6] Section 1357(a)(5) also provides that its authority to arrest for federal felonies only shall be effective upon the Attorney General's publication of regulations, *inter alia*, establishing standards for the government's enforcement activities, specifying the particular federal officials who may use force and the circumstances under which they may do so, and requiring that no officer may exercise the INA's federal felony arrest authority unless they have completed a training program that covers these standards. 8 U.S.C. 1357(a)(5).

United States" that are "committed in the officer's ... presence"); 8 U.S.C. 1357(a)(5)(B) (authority to "make arrests" for "felon[ies] cognizable under the laws of the United States" that the officer has "reasonable grounds to believe" the arrestee has committed).

The Attorney General has issued detailed regulations to implement Congress' grant of enforcement authority, designating the particular immigration officers who are authorized to exercise these enforcement powers and the circumstances under which they may do so. *See, e.g.*, 8 C.F.R. 287.5(a)(1) (designating certain officers authorized to "interrogate" aliens pursuant to 8 U.S.C. 1357(a)(1)); 8 C.F.R. 287.5(b) (designating certain officers authorized to patrol the border pursuant to 8 U.S.C. 1357(a)(3)); 8 C.F.R. 287.5(c) (designating certain officers authorized to exercise authority to make arrests for immigration violations and certain federal criminal violations under 8 U.S.C. 1357(a)(2), (4)-(5), and setting forth detailed standards and guidelines for exercise of arrest authority). These regulations are the result of the Attorney General's "overriding policy [] that an officer should be given only the authorities that the officer needs and has been trained to execute." 59 Fed. Reg. 42406, 42408 (Aug. 17, 1994) (citing Attorney General's "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority" (June 29, 1984)). Since "[e]ach category of immigration officers has a different mission," the regulations implementing the INA's grant of enforcement authority reflect a conscious determination that "only those categories [of officers] who satisfied the Attorney General's criteria [would be] granted one or more of the enforcement authorities" conferred by the INA. *Id.*

Taken as a whole, these provisions make clear that Congress and the Attorney General have carefully regulated both who may exercise the powers to "interrogate" and "search" under the federal immigration laws and when those powers may be exercised. Where the federal immigration laws specify the extent of this authority in such detail, state provisions granting additional authority are pre-empted. *See Hines*, 312 U.S. at 66-67.[7]

C. The Federal Government Has Delegated Immigration Enforcement Authority to State and Local Officers in Certain Narrowly Circumscribed Areas

Any remaining doubt that state laws purporting to authorize state and local officers to enforce the immigration laws are pre-empted should be resolved by reference to the detailed federal provisions governing state and local enforcement of the federal immigration laws. The federal government has provided limited authority for state and local officers to enforce the immigration laws in certain contexts. These provisions establish that Congress has

[7] The United States suggests that no provision of the immigration laws cited by the court of appeals in this case could prohibit a local law enforcement officer from *asking questions* to determine whether or not a particular individual is lawfully present. While the court of appeals' treatment of this issue was extremely cursory, a more detailed examination reveals that Congress and the Attorney General took great pains to specify who has the power to *interrogate* aliens and when they may exercise that power. In any event, it is doubtful that the officers' actions could be characterized as simply asking questions. Having handcuffed Ms. Mena at gunpoint and searched her purse at the time of the questioning, the officers' actions here appear to have included both involuntary questioning, i.e. interrogation, and a "search" within the meaning of the federal immigration laws.

carefully regulated the field governing state and local enforcement of the federal immigration laws, and thereby displaced any state laws on this subject.

1. Authority to Enforce Provisions Relating to Smuggling, Transporting, and Harboring Aliens

Congress authorized state and local officers to enforce provisions relating to criminal alien smuggling in 1952, with the passage of 8 U.S.C. 1324(c) (originally enacted as Immigration and Nationality Act of 1952, sec. 274(b), Pub. L. No. 82-414, 66 Stat. 228, 229 (1952)). That provision states that "[n]o officer or person shall have authority to make any arrests for a violation of any provision of this section [relating to smuggling, transporting, and harboring undocumented immigrants] except officers and employees of the Service designated by the Attorney General *. . . and all other officers whose duty it is to enforce criminal laws.*" 8 U.S.C. 1324(c) (emphasis added).

Thus, Congress has clearly provided state and local officials authority to arrest for violations of the federal smuggling, transport, and harboring provisions, as long as those state and local officials otherwise have authority to enforce the criminal laws.[8]

[8] The legislative history of this provision confirms that Congress made a conscious choice to allow state and local officers to enforce this provision. *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1092-93 (2004).

2. Authority to Enforce Any Immigration Power During Mass Influx

In 1996, as part of the comprehensive immigration legislation enacted first in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and then in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress enacted three sets of provisions that provided detailed rules governing the conditions under which state and local officers could enforce federal immigration laws beyond the limited power established over forty years earlier. First, Congress granted state and local officials authority to enforce any provision of the immigration laws during situations of so-called "mass influx." That provision, now codified at 8 U.S.C. 1103(a)(10), provides that:

> In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer . . . to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter . . . upon officers or employees of the Service.

Id. Unlike Section 1324(c), this provision allows the Attorney General to give local officials any of the authority granted to federal immigration officers, but only allows the Attorney General to make this delegation during situations involving a mass influx occurring near the border.

3. Authority to Enforce Provisions Governing Criminal Illegal Reentry

The second such provision was 8 U.S.C. 1252c, which provides authority for state and local law enforcement officers to enforce the criminal illegal reentry provisions where they receive prior confirmation from INS officials concerning the status of the alien in question.

The statute provides in relevant part:

> Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who –
>
> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual. . . .

8 U.S.C. 1252c(a). Thus, Section 1252c allows local officers to detain and arrest aliens who are illegally present, but only if those aliens have been removed following a felony criminal conviction, and only after the state or local officials obtain appropriate confirmation of the alien's status from INS.

The legislative history of the provision makes clear both that Congress recognized that it had not granted general authority to enforce the immigration laws to state and local officers, and that Congress intended to confer authority only in felony illegal reentry cases where confirmation of status

with the INS had taken place. What is now Section 1252c was first introduced as an amendment to the House Bill that later became AEDPA. Representative Doolittle (R. Calif.) introduced the measure, expressing concern about the absence of authority for state and local law enforcement officials to arrest people for criminal immigration violations:

> In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties.

142 Cong. Rec. H 2190, 2191 (1996) (statement of Rep. Doolittle).[9] However, in the very same set of introductory remarks, he noted that some members had expressed concern about the authority created by the bill, and that he had assuaged those concerns by limiting his bill to encounters with "criminal aliens" and requiring prior confirmation with INS officials:

> Mr. Chairman, by way of summary, I would like to allay fears or concerns that Members may have about the scope of my amendment.
>
> . . . .

[9] This passage also makes clear that the members of Congress understood federal law to preclude state and local arrests for immigration violations in the absence of Congressional authorization. This understanding is consistent with this Court's law governing field preemption in the immigration context, as described *supra* Part I.A.

> [M]y amendment is very narrow and *only covers situations in which the State or local officer encounters criminal aliens within his routine duties. . . . Only confirmed criminal aliens are at risk of being taken into custody.*

Id. (emphasis added). *See also id.* at 2190.

Thus, the legislative history confirms what the statute's text makes clear: that Congress specifically intended to allow arrest and detention by state and local law enforcement officers, but only where they encountered a reentering *criminal alien* and obtained prior confirmation of the person's status, and that Congress prohibited arrest and detention by state and local officers where those conditions were not satisfied.[10]

4. Authority Conferred Pursuant to Written Agreement

Congress passed another even more detailed provision concerning state and local law enforcement authority as part of its comprehensive immigration legislation in 1996.

[10] Several courts of appeals have considered the effect of these provisions in a variety of contexts. In *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), the Tenth Circuit found state authority to arrest for violations of the criminal illegal reentry statute, 8 U.S.C. 1326, which Congress has specifically authorized in Section 1252c. *See Vasquez-Alvarez*, 176 F.3d at 1299-1300. To the extent the Tenth Circuit could be understood to have commented on any broader authority, such comments are dicta. In *Carrasca v. Pomeroy*, 313 F.3d 828, 835-37 (3d Cir. 2002), the Third Circuit expressed doubts concerning the authority of local officials to enforce the federal immigration laws. Finally, although the United States refers to the Seventh Circuit's decision in *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002), that case involved questioning by a federal immigration officer, not by a state or local official. *See id.* at 489.

Section 1357(g) of Title 8 provides the Attorney General with authority to enlist state and local officials in the enforcement of the immigration laws even in the absence of a mass influx, provided that their involvement occurs pursuant to a written agreement with the state or local government that satisfies certain conditions. 8 U.S.C. 1357(g). This provision allows the Attorney General to authorize particular designated state or local officers to perform any "function of an immigration officer in relation to the *investigation*, apprehension, or detention of aliens in the United States." 8 U.S.C. 1357(g)(1) (emphasis added). However, Section 1357(g) also requires that the Attorney General determine that those state and local officers are qualified to perform federal immigration enforcement functions, 8 U.S.C. 1357(g)(1), that the designated state and local officers be trained in the enforcement of relevant federal immigration laws (and that the agreement include a written certification that the officers' training was adequate), 8 U.S.C. 1357(g)(2), that the Attorney General maintain supervisory control and direction over those state and local officers, 8 U.S.C. 1357(g)(3), and that there be a "written agreement" that details "the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual." 8 U.S.C. 1357(g)(5).

The legislative history of this provision confirms that Congress sought to give state and local governments the option to designate certain officers to work with federal officials to enforce provisions of the immigration laws, but only by executing a written agreement with the Attorney General that identifies the officers to be designated, sets

forth the nature and extent of their involvement in some detail, ensures that those officers receive appropriate training in the enforcement of federal immigration laws, and provides for complete federal oversight and control over those officers' involvement with immigration enforcement. Representative Latham, who sponsored an amendment that would have gone even further than Section 1357(g) in authorizing state and local involvement in immigration enforcement,[11] noted that under then-existing federal law:

> there is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case. . . . My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens. . . . [This amendment operates] [b]y allowing – not mandating – State and local agencies to join the fight against illegal immigration.

142 Cong. Rec. H 2475, 2476-77 (1996) (statement of Rep. Latham).[12] In response, Representative Becerra noted the

[11] Representative Latham's amendment would have authorized the Attorney General to "deputize" any law enforcement officer of any state or local government with the consent of that state's governor and pursuant to a written agreement, but without the detailed conditions concerning training, federal supervision, and specificity in the granting of enforcement authority that Section 1357(g) requires. *See* Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. Section 365 (1996).

[12] As Representative Latham recognized, pre-existing law permitted state and local officials to share with INS information pertaining to suspected aliens, but did not permit them to "seek" such information independently. This understanding was formalized in what became 8

(Continued on following page)

concerns of some members that without adequate training and oversight, discrimination could result:

> You do not find the California Highway Patrol or any other State's highway patrol trying to enforce national immigration law. And that is because those are separate and distinct activities. . . . A law enforcement officer with the border patrol is taught and trained on how to conduct himself. . . . [A]s someone who is a member of an ethnic minority, it disturbs me when I hear that we will now have people who are not trained to do a specific type of law enforcement work out there doing something which has in the past caused harm, injury, and discrimination against certain classes of individuals.

Id. at 2477 (statement of Rep. Becerra). Representative Jackson-Lee added that such a provision would undermine police effectiveness:

> I know how important it is for local law enforcement to establish trust with all of the ethnic and minority groups and communities in their cities. . . . It is dangerous to put immigration authority in these local law enforcements [sic] so that they cannot do their real job, which is to protect those communities and . . . engender

U.S.C. 1357(g)(10), which explicitly states that it does not alter this pre-existing authority. *See infra* Part I.C.4. Under the balance Congress struck, state and local officials are not barred from sharing with the Attorney General information concerning immigration violations which they obtain during the course of conducting their routine duties, but state and local officials may not affirmatively seek such information, unless specifically authorized by federal law.

> trust in the community so that they can get the job done.

Id. at 2478 (statement of Rep. Jackson-Lee).[13]

This extensive debate makes clear that instead of enacting a more sweeping measure authorizing state and local enforcement of immigration laws under nearly any circumstances, Congress decided to pass a more limited measure authorizing certain specifically-designated state and local officers – who otherwise would not have authority to investigate or otherwise enforce the immigration laws – to do so only if their state or local government entered into a written agreement with the Attorney General providing for, *inter alia*, appropriate training and complete federal oversight of those officers. As with the other provisions allowing state and local officials to enforce the immigration laws, Section 1357(g) sought a balanced approach that allowed for such enforcement in some situations, but subjected that authority to certain Congressionally-mandated limitations. If Congress believed that state and local officers had general authority to enforce the immigration laws, its limited grant of authority under this provision would have been entirely unnecessary.[14]

* * *

[13] Representative Latham added, towards the end of the debate, that "this is a voluntary program where the INS, on a voluntary basis, with local law enforcement, or the State, join in an agreement, and whatever controls or restrictions put in that agreement, it is up to that agreement [sic]." 142 Cong. Rec H 2475, 2480 (1996) (statement of Rep. Latham).

[14] At least two jurisdictions have entered into such written agreements. *See* Wishnie, *supra* n.8, at 1094.

Given the complexity of the provisions authorizing state and local officials to enforce the immigration laws, the level of detail at which they operate, and the delicate balance struck by the different provisions, there can be no doubt that, taken as a whole, the federal immigration laws have pre-empted state authority to investigate or otherwise enforce the federal immigration laws. *See generally Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982); *Graham v. Richardson*, 403 U.S. 365, 378 (1971); *cf. Gonzales v. Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983). The United States' assertion that these provisions do not encompass Petitioners' questioning of Ms. Mena concerning her immigration status is untenable in light of the specific provisions governing the power to "interrogate" and "investigate," as well as this Court's caselaw concerning pre-emption in the face of state-imposed "interrogation." *See* 8 U.S.C. 1357(a); 8 U.S.C. 1357(g)(1); *Hines*, 312 U.S. at 66.

D. Neither the United States nor Petitioners Have Identified Statutory Authority in Support of Petitioners' Actions in this Case

Although the United States does not discuss in any detail any of the provisions analyzed above, it asserts that a provision in the section of the immigration laws concerning written agreements between the Attorney General and local law enforcement agencies "*allows* local law enforcement officials 'to communicate with the Attorney General regarding the immigration status of any individual . . . ' and 'otherwise to cooperate with the Attorney General in the identification . . . of aliens not lawfully present.' " Br. of United States at 26 n.10 (citing 8 U.S.C. 1357(g)(10)) (emphasis added).

The provision on which the United States relies states in full that:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. 1357(g)(10).

However, by its terms 8 U.S.C. 1357(g)(10) does not in fact "allow" anything. Rather, it states only that the section concerning written agreements does not require such an agreement for any local official to, *inter alia*, communicate or cooperate with the Attorney General in identifying certain aliens. To read Section 1357(g)(10) as an affirmative grant of authority to allow cooperation with the Attorney General in the identification or apprehension of aliens at any time, whether or not any written agreement is in place, would render the specific grants of authority in 8 U.S.C. 1103(a)(10), 1252c(a), 1324(c), and 1357(g) meaningless and do violence to the plain language of Section 1357(g)(10), which by its terms does not affirmatively authorize anything. Indeed, such a reading would produce the bizarre conclusion that states or localities which enter into written agreements with the Attorney

General would actually have less authority to enforce the immigration laws than those which do not, because the written agreements contain limitations (such as the training requirement) that would not be present in the absence of any agreement.

When read in light of the other provisions in Section 1357 and the rest of the immigration laws concerning state and local enforcement, it is clear that Section 1357(g)(10) merely establishes that where the INA *already authorizes* state and local law enforcement of the immigration laws, as in Sections 1103(a)(10), 1252c(a), and 1324(c), no separate written agreement is required to implement the authority granted in those sections. Such a reading also comports with the legislative history, which shows that the drafters of the section recognized that state and local officers already had authority to share immigration-related information with the Attorney General if they came upon it during the course of their routine duties, but that they could not independently seek such information, because that authority had been vested exclusively in the Attorney General. *See supra* at Part I.C.3. and Part I.C.4.[15]

---

[15] Even if Section 1357(g)(10) could be read as a grant of authority, it would only authorize the local officers to share information with the Attorney General and to cooperate with him, not to interrogate aliens on their own initiative. The record does not reflect whether the interrogation and search which occurred here were undertaken at the behest of the INS official or on Petitioners' own initiative. If it occurred at Petitioners' own initiative, it would not be authorized even under the United States' exceedingly broad reading of Section 1357(g)(10).

Even if Petitioners were cooperating with the INS officer within the meaning of Section 1357(g)(10), they may not have had authority to question Ms. Mena if the INS officer had no authority to enter her house, and it is not at all clear that he had such authority under federal law. *See* 8 U.S.C. 1357(a) ("Under regulations prescribed by the

(Continued on following page)

Petitioners seek to justify their questioning of Ms. Mena by arguing that state law gave them authority to enforce the *criminal* immigration laws. They state that California law purportedly gives them power "to arrest for any 'public offense' committed in their presence," Pet. Br. at 25, and assert that they were enforcing 8 U.S.C. 1304(e), which requires lawfully admitted aliens to carry their registration documents with them. *See* 8 U.S.C. 1304(e).[16]

However, Petitioners fail to cite, let alone analyze, any of the numerous federal immigration law provisions which pre-empt the authority they claim under state law. As noted, Sections 1324(c) and 1252c contain express authorization for state and local officials to enforce certain criminal immigration laws under certain specified conditions, but the immigration laws do not provide such authority to enforce Section 1304(e). Where such express authorization exists with respect to some sections of the statute, the

---

Attorney General, an officer . . . of the Service . . . may execute and serve any order, warrant . . . or other process issued *under the authority of the United States*.") (emphasis added). If he did not, the INS officer's presence may have violated Ms. Mena's Fourth Amendment rights. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614 (1999) (holding that officers violated Fourth Amendment by bringing reporter into home while executing search warrant when the presence of the reporter in the home "was not in aid of the execution of the warrant").

[16] There is considerable tension between the arguments presented by the United States and those presented by the Petitioners concerning local officials' authority to enforce the immigration laws. Petitioners apparently contend that they had power only to enforce the criminal immigration provisions, whereas the United States suggests that their power extended to civil violations as well, at least as a matter of federal law. The United States does not discuss the extent of Petitioners' authority under California law, which obviously may limit Petitioners' authority independent of any limits created by federal law.

states may not "complement" that authority with respect to others. *See, e.g., Hines*, 312 U.S. at 66.

Petitioners also cite a Ninth Circuit opinion from 1983 in support of their position. *Gonzales v. Peoria*, 722 F.2d 468 (9th Cir. 1983). But the premise of *Gonzales* was that while the federal government had occupied the field of civil immigration enforcement, the federal statutes relating to criminal immigration law were "few in number and relatively simple in their terms." 722 F.2d at 475. This holding has no validity today, because Congress has enacted various detailed and complex statutes relating to federal criminal immigration enforcement in the twenty years since *Gonzales* was decided.[17]

---

[17] *See, e.g.*, 8 U.S.C. 1160(b)(7) (originally enacted in 1986) (penalizing false statements in applications for Special Agricultural Worker visas); 8 U.S.C. 1253(a)(1) (originally enacted in 1996) (containing four different provisions penalizing conduct related to failing to depart under an order of removal); 8 U.S.C. 1255a(c)(5)(E) (originally enacted in 1996) (penalizing violations of confidentiality rules under amnesty program); 8 U.S.C. 1324a(f) (originally enacted in 1986) (penalizing employers for pattern of employing unlawful aliens); 8 U.S.C. 1324c (originally enacted in 1990) (penalizing document fraud); 8 U.S.C. 1325(c) (originally enacted in 1986) (penalizing immigration-related marriage fraud); 8 U.S.C. 1325(d) (originally enacted in 1990) (penalizing immigration-related entrepreneurship fraud); 8 U.S.C. 1326(b)(1)-(2) (originally enacted in 1988) (providing detailed penalties for reentry after removal based upon commission of certain misdemeanor, felony, or aggravated felony offenses).

Even in 1983, the *Gonzales* court's interpretation of the statute was at war with its plain text. *Gonzales* analyzed a provision in Section 1324, which concerns the smuggling, harboring, and transporting of aliens, that authorized state and local officials to arrest for violations of that section. *See* 8 U.S.C. 1324(c); *supra* at Part I.C.1. The court held that this section implicitly authorized state and local officials to arrest for violations of two neighboring sections – 8 U.S.C. 1325 and 1326 – even though neither section contained a similar provision granting

(Continued on following page)

Finally, even if Petitioners possessed authority under state law to enforce Section 1304(e) and that authority was not pre-empted, such authority would not justify the interrogation in this case, as the officers did not have reasonable suspicion to believe that Ms. Mena was a lawfully admitted alien not in possession of her registration documents. Ironically, Petitioners inadvertently concede this by claiming that they had reasonable suspicion to believe Ms. Mena was illegally present. Pet. Br. at 23. But if this were the case, they could not have had reasonable suspicion to question her concerning a violation of Section 1304(e), because that provision only applies to aliens who have registered with the immigration authorities.

In any event, even if Petitioners had reasonable suspicion to believe that Ms. Mena was a lawfully admitted alien, the record does not disclose any reason whatsoever to believe that she was not in possession of her documents. Interpreting Section 1304(e) to authorize investigation in the absence of such suspicion would transform that provision into a vehicle for local officers to

authority to state and local officials. This holding was untenable under basic principles of statutory construction. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted).

Nonetheless, the *Gonzales* court found that the legislative history of Section 1324 trumped the plain language of the statute. 722 F.2d at 475. Even if such an inference were permissible, the court's reading of that history is unpersuasive, as the history shows only that Congress sought to expand authority to arrest for violations of the offenses related to alien smuggling. *See id.*

investigate anyone to determine if they were an alien, because doing so would then create authority to see if they were carrying appropriate documents. Yet Congress obviously did not intend this result, as it authorized state and local officers to "investigate" violations of the immigration laws only pursuant to written agreements with the Attorney General and in the other narrowly circumscribed conditions described above. *See* 8 U.S.C. 1357(g)(1). Read in light of the provisions governing civil immigration enforcement, it is clear that Section 1304(e) authorizes interrogation or investigation only where officers already have some reasonable suspicion that the target of their investigation is an alien who is not carrying his or her documents in violation of the statute. *See Mountain High Knitting v. Reno*, 51 F.3d 216, 219 (9th Cir. 1995) (holding that "[t]he § 1304(e) arrest power does not permit 'rounding up the suspects' *simply* in order to investigate aliens' immigration status.").[18]

CONCLUSION

This Court should affirm the court of appeals' decision for the reasons set forth in Respondent's brief. In doing so, it need not and should not decide whether Petitioners'

[18] For similar reasons, Sections 1324(c) and 1252c must be read to authorize interrogation only when state or local officers have some prior reasonable suspicion to believe that the subject of their questioning is violating the relevant criminal provisions. Neither provision could authorize the questioning that took place in this case, where there was no reason to suspect either that Ms. Mena was knowingly smuggling, transporting, or harboring undocumented aliens or that she had illegally reentered the country after being deported for a felony conviction.

action in questioning Respondent concerning her immigration status violated the Supremacy Clause. However, if the Court chooses to address the question, it should conclude that because no federal statute authorized Petitioners' interrogation and investigation of Respondent in this case, the state statutes purporting to authorize that activity violate the Supremacy Clause.

Dated: November 3, 2004

Respectfully submitted,

MARK D. ROSENBAUM
AHILAN T. ARULANANTHAM, *Counsel of Record*
ANIL KALHAN, Cooperating Attorney
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, CA 90026
Tel: (213) 977-9500

STEVEN R. SHAPIRO
LUCAS GUTTENTAG
LEE GELERNT
AMERICAN CIVIL LIBERTIES UNION
125 Broad St.
18th Floor
New York, NY 10004-2400
Tel: (212) 549-2500

Counsel for Amicus Curiae American Civil Liberties Union and ACLU Foundation of Southern California